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M. Clark Spoden
Member

August 15, 2023

VIA E-MAIL (Jim.Christoffersen@tn.gov)

Jim Christoffersen, Esq.
Tennessee Health Facilities Commission
502 Deaderick Street, 9th Floor
Nashville, TN 37243

Re: TriStar Hendersonville Medical Center – CON - Gallatin FSED – CN2305-012

Dear Jim:

This letter is in response to your memo to me dated August 11, 2023, advising that the HFC Staff declines our request for revisions to the Staff Report in this matter.

To be clear, our primary concern with the Staff Report was the Staff's reading Criteria #1 to "require" that "[a]ll existing EDs in the service area should be operating at capacity" and the Staff's consideration of "the likely impact of the proposed FSED on existing EDs in the service area" in Criteria #3 as a prerequisite. We submit that these interpretations by the Staff are improper given that **impact on existing providers was removed from the CON law in 2021.**¹

¹ The Executive Director of the then HSDA summarized the 2021 CON law amendment as follows:

Changes to Standards and Criteria under PC 557

1. Need
 - a) Population to be served
 - b) Minimum utilization levels
2. Economic Feasibility
 - a) Adequacy of funds to complete the project
 - b) Sustainable revenue projections
3. Contribution to the Orderly Development of Health Care → Consumer Advantage
 - a) Impact on existing patients
 - b) Impact on existing providers
4. Appropriate Quality Standards
 - a) Accreditation by respected organization

You correctly advised that the rules adopted after the statutory amendment permit “[c]omparison of utilization/occupancy trends and services offered by other area providers.” We do not quarrel that utilization and trends can be a consideration. We do dispute the Staff Report’s inflation of outdated “Criteria” as a *requirement*. Further, because TriStar Hendersonville’s main ED, SRMC’s FSED, and TriStar’s Portland FSED are all at capacity and SRMC’s main ED is nearly at capacity (operating at 84.2% of ACEP mid-range levels), we submit that the Need standard is met. This is bolstered by the plain reality that thousands of patients are bypassing the SRMC facilities and coming to TriStar Hendersonville’s main ED today.

The following is a graphical representation of the law, regulation, criteria and Staff Report (in order of legal significance) on this issue:

2021 CON Reform Law	Removed from CON Law “impact on existing “providers” Provides that Standards and Criteria are to be used “as Guidelines.”
2022 HFC Regulations	Permit comparison of utilization-occupancy trends and services offered by other area providers
2017 Standards & Criteria	Provide that “all existing EDs in the service area should be operating at capacity”
2023 HFC Staff Report in TriStar Gallatin FSED Application	TriStar Hendersonville did not satisfy requirement because 1 of 4 EDs in Sumner County not at capacity

The Staff Report did not reference or quote the rule that permits consideration of utilization trends. Instead, the Staff Report read “all EDs in the service area should be at capacity” to be “**a requirement**” while both Criteria #1 and the statute itself provide that the capacity recommendations are to be used as “**a guideline**.” Standards & Criteria, p. 3 (emphasis added); Tenn. Code Ann. § 68-11-1609(b).

We respectfully submit that **neither regulations nor guidance material can extend legal authority beyond the substantive grant of authority contained in the legislation establishing the governing law.**² And, the Staff Report does just that by elevating pre-2021 “Criteria” over the removal of consideration of impact on other providers from the Statute.

Because the statutory grant of authority for considering the impact on existing providers was removed from the CON statute, any Criteria that includes considering such impact -- such as “[a]ll EDs in the service area should be operating at capacity” in Criteria #1 and “the likely impact of the proposed FSED on existing EDs in the service area” in Criteria #3 -- **are no longer**

² *Tasco Developing & Bldg. Corp. v. Long*, 212 Tenn. 96, 102, 368 S.W.2d 65, 67 (1963) (“an administrative body . . . does not have the power to make a rule or regulation which is inconsistent with the . . . law on the subject”).

legitimate guidance for the Commission. Those are the two Criteria addressed by the Staff Report.

On the merits of the Application, your August 11 memo to me makes two points. First, you contend that “locating an FSED in another town with existing ED services necessitates an analysis of [a] the extent to which it would materially relieve pressure at the hospital's ED *and* [b] whether *patients in the proposed service area* need an additional FSED.”

Accepting these inquiries, TriStar Hendersonville asserts that the FSED proposed in this matter meets both of these considerations.

- Placing a new TriStar Hendersonville FSED in the location selected in West Gallatin will materially relieve pressure at the host hospital’s ED because:
 - Gallatin contributes more emergency patients to TriStar Hendersonville’s main ED than any community other than Hendersonville itself; and
 - many Hendersonville residents and all Gallatin (and Cottontown) patients will be closer to the new TriStar FSED in Gallatin than they are to TriStar Hendersonville’s main ED.
- Indeed, (using the “requirement” the Staff pulled from Criteria #1) patients in the proposed service area need an additional FSED because 3 of the 4 EDs in Sumner County are operating at capacity and patients in the proposed service area prefer TriStar Hendersonville’s ED and SRMC’s FSED over the only existing ED that is operating at less than full capacity, SRMC’s main ED.

Notably, SRMC’s main ED is not empty. It is operating at 84.2% capacity using the mid-range of the ACEP scores:

SRMC 2021 ³ ED visits	Low Range ACEP	Mid-Range ACEP	High Range ACEP
1,107	1,429	1,315	1,200
	77.5%	84.2%	92.3%

In addition, even with two SRMC EDs in Gallatin, 28% of TriStar Hendersonville's emergency patients from the service area are coming to TriStar Hendersonville from areas closer to the proposed FSED site (such as Gallatin, Cottontown, and Eastern Hendersonville) than to TriStar Hendersonville’s main ED. These patients are choosing ***not*** to go to SRMC’s main ED. The Staff’s *requirement* that SRMC’s main ED be operating “at capacity” as a prerequisite to approving this FSED essentially requires residents who are choosing not to go to SRMC to

³ 2021 is from SRMC’s Joint Annual Report (JAR) and is the most recent publicly reported and usable SRMC main ED data. There is more recent THA data available, but we cannot use it due to the THA data restriction policy.

continue to go to an overcapacity ED at either TriStar Hendersonville or SRMC's FSED, despite their disinclination to go to SRMC's main ED in the first place.

Your memo to me further asserts that "[t]here are parts of TriStar Hendersonville Medical Center's existing service area with a high concentration of its patients that would not have been as closely situated to existing providers, for which existing capacity might not have been an issue." We respectfully disagree with your evaluation of the data on this point for the following reasons:

- The assumption that other areas with an undefined "high concentration" of patients that are not "as closely situated to existing providers" is not supported by the facts:
 - The Gallatin/Eastern Hendersonville area has the highest concentration of patients in the service area. Combined, as of 2023, 37066 (Gallatin) & 37075 (Hendersonville) have a population of over 137,000 individuals.
 - 28% of TriStar Hendersonville's emergency patients from the service area are coming to TriStar Hendersonville's main ED areas closer to the proposed FSED site (such as Gallatin, Cottontown, and Eastern Hendersonville) than to TriStar Hendersonville's main ED.
 - The number of TriStar Hendersonville patients coming from the Gallatin and Cottontown zip codes in 2022 equaled more than 5,200 patients (37066 (Gallatin) 4,521 and 37048 (Cottontown) 717).
 - The number of TriStar Hendersonville patients coming from other areas is substantially less than Gallatin:
 - Goodlettsville - 34% less
 - White House – 50% less
 - Madison – 64% less
 - Greenbrier – 89% less
 - The lack or existence of other capacity in Goodlettsville is irrelevant for evaluating the need for additional capacity in Gallatin itself where 4,521 patients in 2022 chose to bypass SRMC's facilities and come to TriStar Hendersonville.

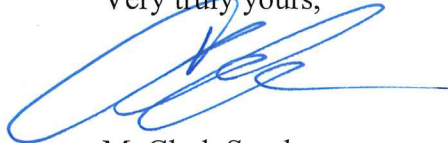
I understand that the Staff feels bound to apply the Criteria. As you noted, an old Chancery Court case says they must be applied. However, the Chancery Court was not faced with a situation like this where the Criteria were written under a law that was substantially changed after the Criteria were adopted. Not amending the Criteria in light of a now two-year old law has landed the Staff in this predicament of advising the Commission on the application of Criteria not supported by the law.

Jim Christoffersen, Esq.
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As you have noted, our disagreement with the Staff Report will be part of the discussion at the hearing on August 23, 2023. It is our regret the Criteria were not applied in a manner consistent with the 2021 CON Reform statute and that we will have to bring that to the attention of the Commission.

If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'M. Clark Spoden', with a large, stylized initial 'M' and a horizontal line extending to the right.

M. Clark Spoden

cc: Byron Trauger, Esq.